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No. 98-1599

IN THE

Supreme Court of the United States

KATHERINE HARRIS, SECRETARY OF STATE
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, BARBARA KING, DOROTHY ROBERTS, JACQUELINE ROSS, LINDA ISAAC and CHARLES STEWART,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the *Burdine-McDonnell Douglas* standard, an applicant for employment, who unquestionably meets an employer's published qualifications for employment, must prove, as a part of the prima facie case, that the employer would judge his qualifications as equal to or greater than those of all other applicants qualifying for employment consideration under the published qualifications?

2. Under *Burdine-McDonnell Douglas* the standard, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the Plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?

PARTIES TO THE PROCEEDINGS

The Petitioners' description of the parties below in the caption to the Petition is almost correct. The Secretary of State of Florida is Katherine Harris, who took office on the first Monday of January, 1999. Ms. Harris is automatically substituted pursuant to Rule 35(3). In addition, Intervenors below, Jacqueline Ross and Linda Issac, were omitted from the Petition's caption, and are not identified in a discussion of the parties. Former Plaintiffs below, Clifford Simmons, Marguerite Stewart and Gracie Holton, have settled their claims, and were not parties in the Court of Appeals.

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The Respondents, Diann Walker, Louvenia Jones, Pearlie Williams, Rosa Henderson, Delores Colston, Barbara King, Dorothy Roberts, Jacqueline Ross, Linda Isaac, and Charles Stewart, argue the Court should deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Circuit Court for the Eleventh Circuit, entered in this proceeding on October 28, 1998.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit, rendered on October 28, 1998, is reported at 158 F.3d 1177 (11th Cir. 1998), and is reproduced in the Petitioners' Appendix A, 1a-56a. The Eleventh Circuit denied rehearing and rehearing en banc on December 31, 1998; the order is reproduced in the Petitioners' Appendix C, 87a-88a. The memorandum decision of the United States District Court for the Northern District of Florida (Paul, Maurice M.) has not been reported, and is reproduced in the Petitioners' Appendix B, 57a-86a. Petitioners' first point (Petition at pp. 8-18) timely invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition's jurisdictional reference is inapposite. Rules 10(a) and 10(c) are addressed to the propriety of granting certiorari, rather than to the Court's jurisdiction.

However, Petitioners' second point attempts to invoke the Court's jurisdiction to review the decision in *Increase Minority Participation by Affirmative Change Today of Northwest Florida (IMPACT) v. Firestone*, 893 F.2d 1189 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990). Although Petitioners' second point is compound, the principal question posed is the precise point on which Petitioners' sought and were denied certiorari more than nine years ago.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, reprinted in Petitioners' Appendix D, 89a, which provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sec, or national origin.

STATEMENT OF THE CASE

This action was filed on June 19, 1979. The Applicants[1] originally invoked the jurisdiction of the federal district court

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1. Petitioners' Statement of the Case is substantially correct. Our departures and additions are noted below. Respondents will be referred to as "Applicants," and the Petitioners will be referenced as either the "Employer" or the "Agency." References will be made to the Petitioners' appendix by the designation "App." followed by the page number. Other record references are to the record before the Court of Appeals.

under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, under 42 U.S.C. §§ 1981 and 1983, and pursuant to 28 U.S.C. §§ 1331 and 1334. At the time of trial, the Applicants proceeded only under Title VII. The amended complaint contained allegations of individual incidents of disparate treatment, and allegations of pervasive patterns and practices of discrimination. The pattern and practice claims charged that the employment system relied upon a predominately white cadre of supervisors, who were accorded wide latitude in making subjective decisions regarding hiring, promotion, evaluation and other terms of employment. They charged the employment system, thus, facilitated ready expression of conscious and unconscious racial animus, and, additionally, had a disparate impact on black employees and applicants. The amended complaint also alleged the Employer utilized written employment examinations in making employee selection decisions, which had a disparate impact on black employees and were not justified by business necessity. (R4-203).

The Applicant's individual claims litigated at trial have been characterized by the Court of Appeals and the Employer as both hiring and promotions claims. However, in this case, a distinction between a hiring claim and a promotional claim exists only in the most technical sense. Both claims are more accurately described as selection claims. The employment system did not utilize classical lines of progression, in which employees progressed from one job to another up the advancement ladder, nor were employees selected for promotion without applying for specific vacancies. Current employees and outside applicants generally competed with one another for vacant positions. In order to compete for a vacancy, both current employees and outside applicants were required to be certified as eligible, by meeting the Employer's published

qualifications for the specific position, and file an application for the specific vacancy. An employee hired for a vacancy, whether an outside applicant or a current employee, received an "appointment." The employment system characterized "appointments" by the status of the selectee at the time of appointment. A current employee who received an appointment to a higher position received a "promotion appointment," whereas an outside applicant receiving the same position received an "initial appointment." Approximately two-thirds of the Applicants were seeking promotion appointments.

The case proceeded as a class action for approximately five years, but was decertified when the district court decided counsel were not financially able to adequately represent the class. App. 5a-6a. The decertification of the class was intertwined with the district court's refusal to allow the Applicants access to employment examination and applicant flow data, which the Applicants contended would have enormously reduced the costs of trying the class claims. Later in the litigation, the Applicants moved to recertify the class after satisfying the financial condition on which the decertification was premised. The district court denied that request. *IMPACT*, 893 F.2d at p. 1191.

At trial, each Applicant proved, at a minimum, that he or she was a member of a racial minority (black), that he or she applied for and was qualified for a specific job for which the employer was seeking applicants, that he or she was rejected and the Employer either continued to seek applicants of the same qualifications or filled the position with another applicant. In most instances, the Applicants demonstrated the persons selected to fill the positions they sought were of the white race. *Id.*, at pp. 1191-1192. The Applicants also proved that the selection process was intended to be and is fundamentally

subjective, and that the overwhelming proportion of persons making the hiring decisions were white persons. *Id.*, at 1192. In most cases, the Applicants identified the white decision-maker who made the selection decision by name and position.

Following Applicants' proof, the Employer produced no evidence, which addressed the motivation or rationale for any of the employment selections at issue. *Id.*, at pp. 1192, 1194. Rather, the Employer's counsel argued to the district court after the close of evidence the reasons counsel perceived for the employment selections. The Employer's statements, beginning at page four of the petition, to the effect that it submitted evidence to support a finding that the best qualified applicants were selected, is highly misleading. No witness testified and no evidence was provided which addressed the motivation of the decision-maker or the rationale for the selection for any of the claims at issue. No witness even contended that any of the employment selections at issue were made on the basis of relative qualifications. *Walker*, 158 F.3d at p. 1182 n.8; App. 9a n.8.

The Employer's evidence consisted predominantly of information elicited through its principal personnel official. The personnel officer, who was first employed almost five years after this litigation began, testified it was the Agency's general practice to hire the "most qualified" applicant. There was no testimony as to what the Employer or the particular decision-maker considered as a "qualification." There was no testimony by any decision-maker, nor any other evidence, that any of the employment decisions were made on the basis of the best qualifications. *IMPACT*, at pp. 1192-1194. It is true, as stated at page four of the petition, that the Employer submitted a substantial quantity of documentary evidence, consisting primarily of the contents of personnel files, skeletal employment histories, performance evaluations, and job

applications, including the applications of the individuals selected.[2] There was no evidence, however, that any decision-maker relied upon any specific parts of the documentary evidence, nor was there any evidence submitted with respect to the relative value of employment credentials revealed by the documentary evidence (education, particular kinds of work experience, etc.) to any of the jobs at issue. Indeed, in what appeared to be a trial tactic, the Employer studiously avoided providing any evidence by the persons making the employment decisions, or providing any other specific justification for the selection decisions which the Applicants might challenge as pretextual.

In the Employer's selection process, applications were accepted by the personnel office only from persons meeting the published qualifications for a specific vacancy. The applications were placed in a selection packet, together with a form listing the applicants, their race, sex, and national origin. The packet was provided to the persons making the selection decision. The decision-maker interviewed the applicants, made the selection, recorded his notes justifying the selection on the appropriate sheet, and returned the packet to the personnel office, where it was thereafter maintained. Florida's public records act, Chapter 119, Florida Statutes, prevented routine destruction. Plaintiffs' Trial Exhibit Z51-B pages 13-30. None of these records were produced by the Employer at trial.

The Employer never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

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2. Job applications prepared by the selectees were admitted over hearsay and materiality objections, without any foundation, other than that they were received by the Employer. There was no evidence the applications were relied upon by the decision-makers.

The trial court assumed, without deciding, that the Applicants established a prima facie case and ruled that the Employer had sufficiently met its burden of production. The district court held:

> In this case, the Defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance, the Defendant denies that race affected the decision. Making that statement satisfies the Defendants' light burden.

R17-664-6. The district court held the Employer met its burden of articulation by merely *contending* that the persons believed to be most qualified were hired, and because it *denied* that race was a factor in its decision. *IMPACT*, at p. 1193. The district court then held the Applicants failed to show the Employer's articulations were pretextual. In a claim by claim analysis, the district judge reached this conclusion by assuming all of the employment decisions were made on the basis of relative qualifications, taking on the mantle of the Employer, and deciding himself that the qualifications of the white selectee were superior in every instance. The court made these findings in the absence of any evidence as to what qualifications were valued by the Employer for any of the positions.[3] The only evidence of

3. Predictably, this approach produced conflicting results. For example, the trial judge found that even though Applicant Walker had greater experience than a white selectee, the selectee was more qualified because he possessed an unrelated college degree. R22-899-7. Four pages later in his order, the district court found that even though Applicant Stewart had the college degree lacked by the white selectees, the white selectees, for three separate positions, were better qualified because they possessed greater experience. R22-899-11-13.

what qualifications were valued by the Employer were the published requirements for each job, which both the appellate panel and the district court agree were met by the Applicants on every claim.

Applicants appealed the merits decision to the Eleventh Circuit Court of Appeals, raising five issues meriting treatment by the panel: (1) Whether the Employer sufficiently articulated a legitimate non-discriminatory reason for each employment selection; (2) whether the district court improperly discounted the expert testimony submitted by Applicants; (3) whether the trial court erred in not recertifying the class; (4) whether the trial court erred in excluding employment examinations; and (5) whether the district court erred in dismissing one of the individual claims. *Walker*, at p. 1181; App. 8a.

The Eleventh Circuit panel held the Employer failed to articulate a clear and reasonably specific legitimate non-discriminatory reason for each of the employment selections at issue. "In not a single case, did the defendants offer proof by any person who made the employment decision, *or by any other person*, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." *IMPACT*, at pp. 1194-1195; App. 8a-9a; emphasis supplied). The Court reasoned the Employer's proof must be judged, in part, by the extent to which it fulfilled the function of framing the factual issue, so that the opposing parties would have a full and fair opportunity to demonstrate pretext. "[T]he defendants offered no evidence explaining any employment decision." *IMPACT*, at p. 1194; App. 9a. The panel held that a defendant's articulation must address the employment selection in a way which explains with reasonable specificity why the particular selection was made. A simple statement that the defendant has a general policy of hiring the best qualified

applicant will not suffice. The Court remanded to the trial court for an initial determination whether a *prima facie* case was established by any of the Applicants. *Id.*

The Eleventh Circuit also determined the trial court improperly eliminated the issue of employment examinations from the litigation. The panel found the elimination of the employment examination issue was intertwined with class certification issues, and remanded for a determination whether the class should be recertified. The Court also reversed the Rule 41(B) dismissal of one of the individual claims. The Court determined the trial judge did not abuse his discretion in rejecting the testimony of the Applicants' expert witness. App. 10a.

On remand, the district court denied a motion by Applicants for judgment on liability, holding, despite the Eleventh Circuit's opinion, that the Employer had articulated sufficiently to avoid judgment.

> In this case, the defendants introduced evidence of nondiscriminatory reasons. . . . Taken as true, however, the defendants' evidence does permit the conclusion that there was a nondiscriminatory reason for the adverse action. Thus, the defendants have met the burden of producing evidence.

R22-879-11-12. The district court disposed of Applicants' employment testing claims by holding they could not be litigated under a disparate impact theory. R22-879-13. Finally, on May 22, 1995, five years following remand, the district court entered an order finding that none of the Applicants had proven a prima facie case, that class

certification should be denied, and reaffirming that the examination claims could not be tried under a disparate impact theory and were thus eliminated from the case. R22-899.

In finding Applicants had not proven a prima facie case, the judge held Applicants were required to prove their comparative qualifications were equal to or better than those of the white selectees. He methodically found Applicants had not met this burden, using similar, and in some cases, identical language as that reversed by the appellate panel's earlier decision. This district court simply shifted the analysis he had previously applied to the pretext stage of the litigation to the prima facie case analysis. R22–899-5-26. The trial court reasoned class certification should be denied, because no Applicant had established a prima facie case, and thus lacked constitutional standing to assert the claims of the class. R22-899-3-27.

Applicants again appealed to the Eleventh Circuit Court of Appeals, raising the following issues: (1) By requiring Applicants to prove their comparative qualifications were equal to or better than the white selectees as a part of the prima facie case, the district court applied an incorrect legal standard; (2) the district court violated the law of the case and the mandate rule by holding the Employer had met its articulation burden, and in failing to adhere to other appellate findings of fact and law; (3) the district court erred in failing to permit Applicants to litigate their employment testing claims under a disparate impact theory; and (4) the district court applied an incorrect legal standard in denying class certification.

On appeal, the Eleventh Circuit affirmed in part, reversed in part and remanded for further proceedings.

First, the court held the district court erred in finding none of the Applicants had established a prima facie case. The appellate panel held that the district court, in requiring the Applicants to prove they were equally or better qualified than the white selectees, failed to apply the binding precedent of the circuit, expressed in *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). In reaching this conclusion, the circuit court found it necessary to resolve seeming and actual inconsistencies in the circuit's precedent. The panel noted that most of the language in Eleventh Circuit cases appearing to lend support to the district court's formulation was actually dicta. *Walker* at pp. 1186-1188; App. 23a-27a. The circuit court identified two cases arguably containing conflicting precedent, *Hill v. Seaboard Coast Line R.R. Co.*, 885 F.2d 804 (11th Cir. 1989); and *Wu v. Thomas*, 847 F.2d 1480 (11th Cir. 1988). In resolving the potential *intra*-circuit conflict, the panel applied the Eleventh Circuit's prior precedent rule, which requires panels of the circuit to adhere to precedent established by earlier panels of the court, unless the circuit, sitting en banc, elects to alter the circuit's precedent. *Walker*, at pp. 1187-1189; App. 28a-30a.

> The prior precedent rule, which binds later panels to the decisions of former panels, is essential to maintaining stability in the law. The rule is "emphatic" and "firmly established" in the Eleventh Circuit.

Walker, at p. 1188; App. 29a. Thus, the circuit panel held the district court must apply the controlling precedent of the circuit expressed in *Crawford*, which described the prima facie case as follows:

> Plaintiffs may establish a prima facie violation by showing that they are members of a group

> protected by title VII, that they sought and were qualified for positions that [the employer] was attempting to fill, that despite their qualifications they were rejected, and that after their rejection [the employer] continued to attempt to fill the positions or in fact filled the positions with [white persons].

Id., 614 F.2d at 1315. The appellate panel did not hold, as represented by the Petitioner at page 7 of the petition, that the prima facie case formulation may not be modified or adapted where circumstances require. The panel simply noted "in passing" that several different standards for the prima facie case had evolved in the Eleventh Circuit, and that "differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, . . ." *Walker*, at p. 1185; App. 20a .

The panel also held the circuit's binding precedent set forth in the Crawford decision was well supported by this Court's later decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

Next, the appellate court examined the record to determine for itself whether the Applicants had submitted evidence at trial, which, if found credible by the district court, would have established a prima facie case. The panel found the Applicants had introduced such evidence on a number of their claims, and vacated the judgments. On these claims, the court remanded for the district court to determine whether the evidence supporting the prima facie case was credible. Citing

Burdine, *supra*, the panel instructed the district court it must enter judgment for the Applicants on such claims as it finds the evidence supporting the prima facie case credible. *Walker*, at pp. 1193, 1198; App. 42a. Where the panel found the evidence supporting the prima facie case insufficient, or there were other grounds to support the judgment, the court affirmed. *Id.*, at pp. 1193-1197; App. 41a-43a.

The panel found that its decision on the prima facie case issues had mooted the Applicants' disparate impact employment testing claims. Finally, the court held its ruling had revived the class certification issues, and left the issue open if the district court determined that at least one of the Applicants was entitled to judgment. *Id.*, at p. 1196; App. 50a-52a.

REASONS FOR DENYING THE WRIT

I.

WHETHER, UNDER THE *BURDINE-MCDONNELL DOUGLAS* STANDARD, AN APPLICANT FOR EMPLOYMENT, WHO UNQUESTIONABLY MEETS AN EMPLOYER'S PUBLISHED QUALIFICATIONS FOR EMPLOYMENT, MUST PROVE, AS A PART OF THE PRIMA FACIE CASE, THAT THE EMPLOYER WOULD JUDGE HIS QUALIFICATIONS AS EQUAL TO OR GREATER THAN THOSE OF ALL OTHER APPLICANTS QUALIFYING FOR EMPLOYMENT CONSIDERATION UNDER THE PUBLISHED QUALIFICATIONS?

The Eleventh Circuit's decision in this case closely follows the instructions of this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),

Burdine, *supra*, and *Patterson*, *supra*. The Petitioners' argument that plaintiffs, who have shown they are fully qualified to assume the employment positions at issue, must also prove, as a part of the prima facie case, their qualifications were equal to or greater than the individuals selected by the employer misconceives the functioning and purpose of the various elements of the circumstantial proof model.

One obvious flaw with the Employer's argument is that it ignores that the *Burdine-McDonnell Douglas* formulation was calculated to deal with disparate treatment.

The plaintiff's *prima facie* case serves the important function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S. Ct. 1094. After the plaintiff establishes a *prima facie* case, the burden of production passes to the defendant to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason." *Id.* The defendant's articulation serves the important functions

> to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 101 S. Ct. 1095. The sufficiency of the defendant's articulation is to be judged by the extent to which it fulfills the foregoing functions. *Id.* Where the defendant fails to meet its light burden of explaining the reasons for its actions, however, the defendant denies the plaintiff an opportunity to demonstrate pretext. "[I]f the employer is silent in the

face of the presumption [created by plaintiff's *prima facie* case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*, at 101 S. Ct. 1094. If the defendant carries its light articulation burden, the burden of persuasion remains with the plaintiff to persuade the trier of fact the defendant's proffered reason is a pretext for discrimination.

Where a plaintiff has demonstrated he or she is fully qualified to assume the employment position at issue, requiring a heightened demonstration of qualifications — proof that the employer would have judged the plaintiff's qualifications equal to or greater than those of the selectee — does not serve the purposes of the circumstantial proof model, and will often present the plaintiff with an impossible burden.

The *Burdine-McDonnell Douglas* circumstantial proof model focuses on intentional discrimination. Where a proof formulation requires the plaintiff to address factors unrelated to the decision-maker's intent, it runs at cross purposes to the *Burdine* formulation. The question is not whether a fair-minded person might have reached the decision urged by the employer, but, rather, whether the actual decision-maker was motivated by racial considerations. The *Burdine-McDonnell Douglas* model "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254 n.8, 101 S. Ct. 1089 at 1094 n.8. An employer is not required by Title VII to hire the best qualified applicant; it need only make its selection free of a discriminatory animus. *Burdine*, at 450 U.S. 258-59. Thus, one does not address the question of intentional discrimination by requiring a plaintiff to demonstrate comparative qualifications before the employer articulates the employment selection was made on that basis. In every case where the

employer did not make its selection based upon relative qualifications, the prima facie case model argued by the Employer would require a plaintiff to address his or her evidence to facts not at issue between the parties. This alternative model, in fact, conflates the *Burdine-McDonnell Douglas* model, by assuming the employer made its decision in all cases based upon relative qualifications, and collapsing the plaintiff's burden of showing pretext into the prima facie case. The modified proof model would, ironically, insulate a selection decision made purely on the basis of race on every occasion the plaintiff could not demonstrate comparative qualifications equal or greater than those of the selectee.

A requirement of proof of comparative qualifications in these circumstances also runs afoul of *Burdine's* admonition that the prima facie case is not "onerous," *id.* at 450 U.S. 253, by posing an often impossible burden on the plaintiff. The Employer's argument would require proof prior to an employer's "reasonably specific" articulation of why the selection decision was made. The relative value of personal characteristics that may be denoted as "qualifications" varies widely, and may be infused with subjective, personal, technical or other preferences which are not readily apparent. The court of appeals, in *IMPACT*, noted some of the pitfalls in treating qualifications in the abstract.

> Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work of any combination of them.

IMPACT, 893 F.2d at p. 1194. The *IMPACT* panel noted that a mere statement by counsel at the articulation stage

that the employer hired the best qualified applicant "leaves no opportunity for the employee to rebut the given reason as pretext." *Id.* Moving the burden of adducing evidence of comparative qualifications to the prima facie case greatly exacerbates the difficulty noted. "Only the employer knows whether it truly considered relative qualifications when determining whether to promote the plaintiff, and only the employer can establish what qualifications it actually used to make its promotion decisions." *Walker*, at p. 1193; App. 40a.

The Employer's argument, at pages 8-14 of the Petition, that the circuit panel decision conflicts with prior decisions of this Court is grounded in an incorrect premise.[4] The argument assumes, incorrectly, that the Eleventh Circuit panel held the prima facie case may never be modified. To the contrary, the circuit panel simply "noted in passing" that a number of different standards for the prima facie case had evolved in the Eleventh Circuit, and that "differing standards of proof for different types of injury under Title VII only promotes confusion and inconsistency, a result undesirable in any context, but one which is exacerbated in Title VII jurisprudence because of the general instability that pervades this area of the law." *Walker*, at p. 1185; App. 20a. This observation by the panel, which is purely dicta, does no more than suggest caution in making changes in the prima facie case in order to promote stability in the law. The panel did not bar any modification of the prima facie case. Indeed, the *Crawford* decision, recognized by the panel as the circuit's binding precedent, is itself an

4. Although not stated in the caption, the Employer also appears to argue, at page 8 n.5 of the Petition, that the panel decision conflicts with other Eleventh Circuit cases. Resolution of *intra*-circuit conflicts is ordinarily left to resolution by the various circuits, and is not a substantial ground for a grant of certiorari. *See* Rule 10.

adaptation of the prima facie case described in *McDonnell Douglas*. Because the *McDonnell Douglas* standard arose from a case in which there was no showing the employer had ever hired anyone for the position sought by the plaintiff, the Eleventh Circuit panel explained that *Crawford* adapted the "*McDonnell Douglas* standard to address a situation in which the plaintiff 'loses out' to another applicant." *Walker*, at p. 1186; App. 21a.

The decision in this case does not conflict with decisions of this Court. In fact, the *Crawford* adaptation of the prima facie case mirrors this Court's later decision in *Patterson*. *Crawford* adapts the fourth element of *McDonnell Douglas* to require a plaintiff to prove that "after rejection [the employer] either continued to attempt to fill the positions or in fact filled the positions with [persons outside the plaintiff's protected class]." *Crawford*, at 614 F.2d 1315. *Patterson* described this element in virtually identical terms.

> Here, petitioner need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that *after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee.*

Id., at 491 U.S. 186-187 (emphasis supplied). It is difficult to discern how a standard, such as that in *Crawford*, which mirrors this Court's articulation in *Patterson*, could materially misstate the requirements of the prima facie case.[5]

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5. The panel also found that, since *Patterson* held a district court could not require a plaintiff to show equal or superior qualifications (Cont'd)

The Employer's arguments, at pages 15-18, that the panel decision conflicts with the decisions of other circuits is likewise incorrect. Each of the cases posited by the Employer uses language to describe the fourth element of the *McDonnell Douglas* standard which paraphrases the language used by this Court. From *McDonnell Douglas*, the fourth element requires a plaintiff to prove that "the position remained open and the employer continued to seek applicants from *persons of complainant's qualifications*." *Id.*, 411 U.S. at p. 802 (emphasis supplied). Given the development of the prima facie case in subsequent cases, and particularly the formulation stated in the *Patterson* decision, the terms "persons of complainant's qualifications" certainly refers to element two — that is, to other persons qualified to hold the position.

All of the cases posited as in conflict with the panel decision describe this fourth element with such terms as "qualifications similar to those of the plaintiff," *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 327 (1st Cir. 1996), "person of comparable (or lesser) qualifications", *Carney v. Textron Automotive Co.*, 165 F.3d 26 (6th Cir. 1998), "persons with comparable qualifications," *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145, 1148 (9th Cir. 1997), "person of similar qualifications," *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1126 (8th Cir. 1997), "similar or lesser qualifications for the position," *Pafford v. Herman*, 148 F.3d 658, 669 (7th Cir. 1998). Each of the posited cases purport to have drawn this language from *McDonnell Douglas*, and the language should be viewed as conveying a similar meaning. None of the cases

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(Cont'd)
in order to establish pretext, it was not reasonable to believe comparative qualifications could be permitted to burden the prima facie case. *Walker*, 158 F.3d at pp. 1191-1192; App. 35a-40a.

present circumstances which remotely suggest the circuit court applied the language as did the district court in this case.[6]

In *Lehman*, the district court had decided Mr. Lehman failed to prove a prima facie case. *Id.*, 74 F.3d at 328. The circuit court, however, found the plaintiff had not shown pretext, thus relieving the court of "tarry[ing] over the prima facie case issue." *Id.* The discussion of the prima facie case issue is certainly dicta, and, importantly, the context of the decision does not show conflict. In *Carney*, the circuit court found the plaintiff clearly was not qualified, making any discussion of the fourth element of the prima facie case dicta. *Id.*, 165 F.3d at __. Moreover, *Carney* was issued by the panel under Circuit Rule 24, which severely limits its value as precedent, and recommends against publication. *Cordova* reversed a summary judgment determination by the district court, finding the plaintiff had proven a prima facie case. In doing so, the circuit court used the terms "persons with comparable qualifications," as synonymous with "other persons qualified for the position." *See id.*, at 124 F.3d 1148 and n.4. Moreover, nothing in the opinion suggests the court required Ms. Cordova to prove, at the prima facie case stage, her qualifications were at least equal to those of other applicants. In *McCullough*, the court reversed a finding of summary judgment, finding the plaintiff established a prima facie case, but Ms. McCullough was so plainly superior to the white selectee that the court had no occasion to construe the fourth element of the prima facie case. In *Pafford*, the circuit court found the plaintiff was not qualified for the promotion, thus any discussion of the fourth element is dicta. Although the court noted Ms. Pafford also failed to show she was "as

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6. Indeed, the description of the fourth element of the prima facie case is dicta in most of the posited cases.

qualified or more qualified than the four Caucasian employees who were promoted," it is certainly not clear whether the court would have found her equally qualified had she proven element two — that she met the qualifications for the position. In short, the cases posited by the Employer do not show a conflict among the circuits.

II.

UNDER *MCDONNELL DOUGLAS-BURDINE* STANDARDS, MAY A DEFENDANT MEET ITS ARTICULATION BURDEN BY MERELY CONTENDING IT HAS A GENERAL POLICY OF SELECTING THE BEST QUALIFIED APPLICANT AND PRODUCING EVIDENCE OF THE PERSONAL CHARACTERISTICS OF THE PLAINTIFF AND THE PERSON SELECTED, WITHOUT PRODUCING ANY EVIDENCE OF THE SPECIFIC REASONS FOR ITS SELECTION DECISION. IN OTHER WORDS, IS IT SUFFICIENT FOR A DEFENDANT TO PROVIDE THE TRIAL JUDGE SOME PART OF THE DATA WHICH MAY HAVE BEEN AVAILABLE TO AND CONSIDERED BY THE DECISION-MAKER, AND ALLOW THE JUDGE TO DETERMINE WHETHER ANY NON-DISCRIMINATORY RATIONALE CAN BE FASHIONED FROM THE AVAILABLE DATA?

Under this point, the Employer attempts to invoke the Court's jurisdiction to review the decision in *Increase Minority Participation by Affirmative Change Today of Northwest Florida (IMPACT) v. Firestone*, 893 F.2d 1189 (11th Cir.), *cert. denied*, 498 U.S. 847 (1990). Petitioner attempts to bootstrap the issue by compounding it with the question whether the district court is required to enter judgment against a defendant

who fails to meet its articulation burden. Nevertheless, the principal question posed is the precise point on which Petitioners' sought and were denied certiorari more than nine years ago. The strictures of law of the case apply to this issue, and the Employer has made no argument to support its attack on *IMPACT*, *supra*.

The Employer is incorrect in its implied argument that the decision in *IMPACT* violates the precedents of this Court. In no sense did *IMPACT* hold, as urged by the Employer, that the burden of production can only be met by the oral testimony of the actual decision-maker. The appellate court merely rejected, as insufficient under this Court's precedents, an articulation which consisted of "[i]n not a single case, . . . proof by any person who made the employment decision, *or by any other person*, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." *IMPACT*, 893 F.2d at p. 1194. The Eleventh Circuit panel was concerned, not with who provided the Employer's evidence, but with the content and quality of the explanation given.

In this case, the Employer submitted no evidence of the reasons for any of the employment decisions at issue. This was not a case in which the rationale for the employment selections was reasonably discernible by the Applicants. Even had the Applicants assumed the Employer relied upon "qualifications," they had no method to discern what each decision-maker considered a "qualification," or what qualifications were pivotal in the selection for each job at issue. Neither the Applicants, nor the district court, received any explanation from the Employer from which to determine why the employment selections were made.

Rather than holding a defendant must produce as evidence the oral testimony of the actual decision-maker, or that a defendant is limited, in making its articulation, to any particular character of admissible evidence, the Court of Appeals held, simply, that the employer's explanation must be made through admissible evidence, not the contentions of its counsel after trial. The explanation must be clear and reasonably specific, and must address the reasons for the employment decision at issue.

> We determined in *IMPACT* that the defendants had failed to present any probative evidence at trial regarding the motivations of the decision-maker with regard to any of the plaintiffs' claims. *See IMPACT*, 893 F.2d at 1194 ("In this case, the defendants offered no evidence explaining any employment decision.") Although a State official testified that the Department of State hired only the best-qualified individuals for State jobs, the defendants presented no evidence regarding the particular decisions challenged by the plaintiffs. Thus, we held that the defendant failed to carry its burden of production under *Burdine*, explained in part II.A. *infra*. *See IMPACT*, 893 F.2d at 1193-94.

Walker, 158 F.3d at p. 1182 n.8; App. 9a. Thus, the IMPACT decision did not limit the Employer to any particular kind of evidence; it held, simply, that the Employer did not submit any evidence probative of the reasons for the employment decisions.[7]

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7. The Employer never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

The Employer also appears to argue that the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), alters the consequences for failing to meet the employer's articulation burden. The plain language of the Court's decision *in St. Mary's* is otherwise.

> At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, . . . the defendant has failed to meet its burden of production — i.e. has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials).

Id., at 509 U.S. 509. Since, in this case, the Employer "failed to present any probative evidence at trial regarding the motivations of the decision-maker", *Walker* at p. 1182, App. 9a n.8, the Employer effectively stood silent in response to plaintiffs' evidence.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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